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as to have enabled the libellants to bring her round to Baltimore, where she could be taken upon the Railway and repaired; and the intelligent gentlemen who examined her at the request of the libellants, recommended this course, and gave it as their opinion, that there would be but little risk in bringing her to Baltimore.

In the Supreme Court of the State of New York.

FREEMAN CLARKE vs. THE CITY OF ROCHESTER.

1. Where city of Rochester had become subscribers to the capital stock of a Railroad, under a special Act of Assembly, *held*, that the contract was void as being in violation of the Constitution of New York. The rights of eminent domain and taxation considered.
2. The power to tax property in aid of a private corporation, or for the purchase of its stock, is not among the ordinary powers of a municipal government, and requires special legislation to confer it, and this legislation is, in New York, prohibited by the constitution. Per ALLEN, J.
3. The principle settled in *Barto vs. Himrod*, 4 Seld. 488, recognized and approved.

The plaintiff brings this action to recover the money paid upon a contract between the parties, bearing date March 2d, 1853, in respect to three hundred thousand dollars of the capital stock of the Genesee Valley Railroad Company, for which the defendants, in their corporate capacity, had become subscribers under the provisions of chapter 389 of the laws of 1851, and in part payment for which they had issued and sold the bonds of the city to the amount of one hundred thousand dollars.

By the agreement between the parties, the plaintiff agreed to purchase of the defendants the stock subscribed for by them, and to pay for the same at the times and in the manner particularly specified, and the defendants agreed to issue the city bonds for the remaining two hundred thousand dollars, and deliver the same to the plaintiff from time to time, as provided by the contract.

The plaintiff has paid to the city at different times, in part performance of the contract on his part, the aggregate sum of forty-one thousand seven hundred and forty dollars, and has received on

the premiums of the bonds sold by the city, and which, in pursuance of the terms of the agreement, were paid to the plaintiff, and by way of interest paid by the Railroad Company upon the payments made by the city upon their subscription, the sum of twenty-six thousand five hundred and forty-one dollars and eighty-seven cents.

The cause was tried at the Monroe Circuit, by the court, without a jury.

S. Matthews, for plaintiff.

E. Griffin and *O. Hastings*, for defendants.

The opinion of the court was delivered by

ALLEN, J.—The plaintiff bases his claim to recover, in this action, in the want of power in the city of Rochester to become a subscriber to, or holder of the capital stock of the Genesee Valley Railroad Company, or to issue the bonds of the city for the purposes mentioned in the agreement of the parties, claiming that the law under which the defendants have assumed to act in the premises, is unconstitutional and void. The provisions of the statute under which the authority was assumed by the defendants, make a part of an act amending the act to amend and consolidate the several acts relating to the city of Rochester. (Chapter 389 of Laws of 1851.)

Sections 285 to 292 of that act, inclusive, provide for the borrowing by the Common Council, on the faith and credit of the city, of three hundred thousand dollars, and the execution of bonds therefor, under their corporate seal, and the investment of the money thus raised in the stock of the Genesee Valley Railroad Company, by a subscription to, or a purchase of, such stock, and for the holding, management and disposal of the stock, the receipt of the dividends, and the collection by tax upon the real and personal estate of the city, of any sums necessary to defray the interest upon the bonds after the application of the dividends to that purpose. By section 291, it is declared that the sections conferring this power upon the Common Council, and prescribing the mode of its execu-

tion (285 to 291) should not take effect until they should have been submitted to the electors of the city, at an election to be held as in the act prescribed.

A city, as a public municipal corporation, organized for political and governmental purposes, is in many respects subject to different rules from those which are applicable to mere private corporations. The binding force of the organic law upon the corporators does not depend at all upon their assent to its terms, and there is nothing in the charter, or act of organization, having the effect of a contract between the State and the body corporate thus formed. City governments are said to be *imperia in imperio*; they are auxiliaries to the government, having the privilege of managing their own local interests, under the authority and protection of the State.

The city authorities, representing the people secondarily to the legislature, can only be invested with that power over the property of the individual citizen which the people primarily, or the legislature as the representatives of all the people, originally possessed.

In other words, while private corporations may be formed for any and all lawful purposes, the corporations by accepting of the charter, assenting to and becoming bound by its terms, and the sovereign as well as the corporators being bound by the contract thus expressed, a municipal corporation can only be formed for political purposes, and invested with such powers as are necessary or incidental to the purposes of a local government. The sovereign power by which the corporation is created, may repeal, alter or modify the charter. The powers conferred are mere municipal regulations, subject to the absolute control of the government, with the qualification that the power delegated to the subordinate legislature cannot exceed that possessed by the legislature from which the power is immediately derived.

The legislature of the State cannot do that by a local and subordinate legislative body, deriving all their powers from it, which it could not do directly by its own proper legislative enactment. The legislative power of the State is vested in the Senate and Assembly. This power is not defined by the constitution, but constant restrictions and limitations upon its exercise, are imposed by it, and subject

to the restrictions and limitations of that instrument, the power of the legislature acting in the place of and representing the people, is ample to do all the people could rightfully do. The restrictions are either imposed in express terms, or are the result of a necessary implication from the language employed, or the powers expressly conferred. For example, the constitution by authorizing the appropriation of private property to public use, and in a single instance for a private use, impliedly declares that for any other purpose private property shall not be taken—per Savage, Chief Justice, *in the matter of Albany Street*, 11 Wend. Rep. 149. The constitution has been denominated the commission of the legislature, within the pale of which they must act, and one great utility of constitutions in a government like ours, consists in defining with some accuracy the boundaries within which the powers of the several departments of the government are limited, and the protection thus afforded to the individual citizen, against the encroachment of delegated power, which is said to be always aggressive. There is no provision in the constitution of this State, in terms prohibiting the legislature from compelling the citizen, either individually or in communities, against their will, to become shareholders in companies formed for the construction of canals, railroads, manufacturing, commercial, or other purposes, or denying to the legislature the right to judge for the citizen what investments of capital shall be made by him, or in what business he shall embark, either with a view to a profitable return, or to the benefit of his property at large, or the greater benefit of the public; neither is such power conferred, and its assumption is adverse to the spirit of the whole instrument, and inconsistent with the just rights of the people.

No person shall be deprived of life, liberty or property, without due process of law, nor shall private property be taken for public use without just compensation; and but one case is recognized as a fit case for the taking of private property for private purposes, and that is the case of a necessary private road, which being expressly provided for according to well established rules of construction, excludes every other case. Art. 1, §§ 6, 7. The credit of the State shall not in any manner be given or loaned to, or in aid of

any individual, association or corporation, (Art. 7, § 9,) and an effort was made by § 12 of the same article, to restrict the power of the legislature to contract debts, by or on behalf of the State, even for the legitimate public purposes. That the effort has not proved successful, does not detract from the force of the provision, as evidence of the intent of its framers.

And sections 13 and 14 are designed to induce caution in the imposition of taxes by the legislature.

It is also enjoined upon the legislature to provide for the organization of cities and incorporated villages, and to restrict their power of taxation, assessment, borrowing money and contracting debts, and loaning their credit; so as to prevent abuses in assessments, and in contracting debts by such municipal corporations. Art. 8, § 9.

These several provisions brought together tend to show the general scope and design of the instrument, and the intent of its framers, and thus throw some light upon particular provisions bearing more directly upon the question before me, and aid in their construction; at least, they show that it was no part of the design of its framers to confer any enlarged or doubtful powers upon the State or municipal legislatures over the property of the citizen.

The property of the citizen is, to some extent, in the power and at the disposal of the government. Its use may to some extent be regulated. It may be forfeited for crime; it may be condemned by appropriate process as injurious to the health or morals of the public, or to the well-being and safety of the State; it is liable to be taken for public purposes upon just compensation made; and it is liable to taxation and assessment for the general purposes of the government, or for local benefits and improvements. But the citizen does not hold his property by so slight a tenure that it can be taken from him by the legislature, for any and all purposes, either under the guise and form of taxation, or color and pretence of exercising any of the other recognized powers of the government. All power in the legislature over the property of the citizen is derived from the people, and is either expressly conferred by the terms of the constitution, or impliedly granted, as incidental to some

power expressly given, or results from the necessities of government, and exists as an incident to government.

I know of but two ways in which, except by process of law, the property of an individual may, without his consent, be taken from him, or in any way encumbered. The one is in virtue of the right of eminent domain, for which provision is made by the constitution, and the other is by taxation, the right of which is necessarily inherent in the government. The citizen is protected against any other attempt upon his property, by the declaration that he shall not be deprived of it except by due process of law.

The proceedings of the Common Council of the city of Rochester, by which they have undertaken to bind the corporation, and to this extent burthen and encumber the taxable property of the city, for the payment of three hundred thousand dollars in return for a like amount of capital stock of a railroad company, is not an attempt to take property by due process of law, which imports a suit instituted and conducted according to the present forms. *Taylor vs. Porter*, 4 Hill Rep. 140. Neither is it, nor is it claimed, to be an attempt to exercise the right of eminent domain, the power to exercise which may be delegated by the legislature to a municipal corporation to be exercised within the territorial limits of the city or village.

The right of eminent domain operates upon an individual,—the right of taxation upon a community, or a class of persons in a community. *People vs. Brooklyn*, 4 Comstock Rep. 419. The authority of the legislature to confer upon the Common Council the power to purchase or subscribe to the capital stock of the Genesee Valley Railroad Company, and to borrow money upon the corporate bonds of the city to pay for the same, if it exists, must rest for its foundation upon the right of taxation, which is a right existing of necessity. Although the projectors of the law, and those who favored its sanction by the electors of the city of Rochester, may not have supposed that the act of subscription to, or the purchase of the stock of the company, and the payment therefor in the bonds of the city, would result in any actual burthen to the tax-payers, and although it is possible that in no event would loss or harm

come to the city, and that property holders will realize all the benefits, direct and indirect, which were anticipated from the construction of the road, and the stock received will redeem the bonds of the city, and in the meantime by dividends of its earnings meet the interest as it accrues, it must nevertheless be treated for all purposes as a burthen to the amount of the bonds and the accumulating interest imposed by the sovereign power upon the taxable property of the city, and whether payable by tax, to be raised this year or in 1873, is immaterial so far as any principle is involved on the question of authority.

If the legislature or the Common Council, acting under its authority, had the right to charge the taxable inhabitants and property of the city with the payment of this large amount in 1873, they had the right, and a better and clearer right, to require its payment in 1856, or by tax to be levied at once upon their own property, rather than that of posterity, who have no voice in the matter. For the power being conceded, there is no jurisdiction vested anywhere to control or regulate its exercise. In matters within its jurisdiction the legislature is supreme,—it cannot be controlled as to the amount of taxes, where it may lawfully impose any, or the mode, manner, or time of their collection.

The act contemplates a deficiency of dividends to meet the accruing interest, and therefore provides that the deficiency shall be met by a tax upon the property of the city, and it also contemplates a possible sale of the stock below par, and in that event, the necessary result would be a tax to redeem the bonds to the amount of the deficiency. But it is sufficient for the purposes of this case, that the burthen is imposed upon the property of the city by the execution of the corporate bonds, which, if the law is valid, may be enforced against the city by tax. Could, then, the legislature of the State, directly by act of its own, or indirectly by act of the Common Council, proceeding in subordination to, and by authority of the legislature, have imposed a tax of \$300,000 upon the taxable property of the city, to be paid when collected to the Genesee Valley Railroad Company, or any holder of its stock, whether named in the act or not, upon the transfer to the city authorities of that

amount of the stock of that road? It is clearly a question as to the right of taxation, and not of eminent domain. Judge Ruggles, in *The People vs. Brooklyn*, says; "that money cannot be exacted by the government by right of eminent domain, excepting, perhaps, for the direct use of the State at large, and when the State at large is to make compensation." "The framers of the constitution could not have intended to delegate to municipal corporations the right of taking money under this power, because it is entirely unnecessary."

Taxation is an incident to sovereignty, and by it the public burthens are apportioned among those who ought, in the judgment of the legislature, to bear them, and it is said by Chief Justice Marshall, in *McCulloch vs. Maryland*, 4 Wheaton Rep. 316, "that as the exigencies of the government cannot be limited, the people of a State impose no limits to the exercise of this right of taxation," and the same doctrine is asserted in substance, by the same judge, in *The Providence Bank vs. Billings*, 4 Peters' Rep. 514. Both cases, however, assume that taxes are only to be imposed to meet the exigencies of the State for the discharge of the public burthens, and that it is only *those burthens* in the apportionment and levying of which the legislature of a State is supreme, or in regard to which they have any authority. Judge Ruggles in the case before cited, says: "Taxation exacts money or services from individuals, *as and for their respective shares of contribution to any public burthen.*"

In *The State Bank of Ohio vs. Knoop*, 16 How. Rep. 369, McLean, Justice, in pronouncing the judgment of the court, says: "The power of taxation has been compared to that of eminent domain, and it is said as regards the question before us, they are substantially the same. These powers exist in the same sovereignty, but their exercise involves different principles. Property may be appropriated for public purposes, but it must be paid for. Taxes are assessed on property for the support of the government, under a legislative act."

Whenever a tax is imposed by the sovereign power of the State, it will be assumed, unless the contrary clearly appear by the act

itself, that an exigency or necessity existed, and that it is as for a part of the public burthen proper; and if in any case a law of the State imposing a general tax should be held invalid for want of jurisdiction, it must be palpable that the public are not in any manner interested in it, as would be the case of a law, directing a tax to be levied and the avails given to a particular individual, or appropriated to some admitted private purpose, in which the public had no concern, and from which they could derive no benefit. That the right of taxation for such a purpose is among the reserved rights of the people over the property of the State, or among the inherent powers of the government, I am not prepared to believe.

The legislature may, in legislating for a particular locality, regulate the burthens and expenses of its government, and make the property of the locality to bear all the burthens and expenses incident to its government; this power may be delegated to a local legislature, as the Common Council of a city. But the local burthens to be borne must, I think, be confined to the expenses incident to the locality, and the particular community sought to be taxed.

The city of Rochester could not properly be taxed for the support of the local government of the city of Auburn. The legislature might provide by law a proper police for the city, make all necessary sanitary regulations, cause all necessary streets to be laid out, opened and worked, and all local improvements to be made, and do whatever else, within the locality, they should deem proper for the good government of the community, and assess the expenses as a part of the public burthen, upon the community for whose benefit the expenses should be incurred, or such part of the community as they should think ought, by reason of particular benefits, to be charged, and this power may be delegated to the Common Council of a city for the locality embraced within its boundaries.

But the jurisdiction of the substituted legislature is strictly local, and the burthens which they are authorized to impose upon the constituent body, must be directly incidental to their government, and be strictly such as concern them as a community bound together

by their charter, for municipal purposes. A city or other locality may be taxed by reason of local benefits, for a public work, beyond what the residue of the State is taxed for the same object. *Thomas vs. Leland*, 24 Wend. Rep. 65. The entire work is a public work, and its cost a public burthen, in the apportionment of which the legislature have a discretion which cannot be controlled. This does not prove that every project requiring the expenditure of money is a public burthen, the proper subject of a tax, because the legislature, State or local, so elect to name it; and it by no means follows, that they can be taxed for the benefit of a private corporation, although the work undertaken by it is so far public that it will be considered as representing the State in the exercise of the right of eminent domain in the entering upon and taking property necessary to its construction. A bill appropriating the public moneys or property to the use of such a corporation, would require a two-thirds vote of the legislature, as an appropriation of the public moneys, &c., to a private purpose. Constitution, Art. 1, § 9. Smith on Statutes, &c., 418 and § 29.

But the acts of the Legislature and Common Council involved in this action, do not profess to impose a tax, or to provide for a tax in *futuro*, either absolutely or upon any contingency, in aid of the construction of any work, public or private. They simply provide for a certain number of shares of the capital stock of a private corporation, in virtue of which the city is to become a shareholder, with all the rights, privileges and liabilities of other shareholders.

The building of the road contemplated, may or may not be of great incidental advantage to the city of Rochester, and greatly appreciate the value of real property within its limits, but this being conceded, it will be difficult to prove that the purchase of the stock in the company is within the legitimate power of the legislature or the Common Council, or that its cost is among the burthens which can be the proper subject of taxation. The building of manufactories, the establishment of large commercial houses, and extensive business and commercial operations, and the building and sailing of vessels, may be each and all essential to the prosperity of a city, and may all be accomplished by incorporated or unincorporated

associations, organized for the purpose ; but it has not, that I am aware of, been supposed that a city could properly become a partner or stockholder in any such association, and levy by tax upon the property of the city, the necessary contributions for the purpose. If so, then a city can, by act of the legislature, become one vast railroad, manufacturing or commercial corporation, or if thought best, a banking association. If individuals choose to invest their property or credit in enterprises of that character, they may do so, and no law will be invoked to prohibit it, but the option whether to embark in them or not, should be, and I think is, with the individual citizen, and not with his representatives in the city or State government. It is not necessary to say that municipal corporations may not in any case exercise a special franchise vested in them by the legislature, with a view to the increase of their revenue, an enhancement of the public property, or a diminution of the necessary public expenditures.

The right of taxation, however, can only be exercised either by the legislature or the municipal corporation, in respect to the proper public burthens incident to the city government and the exercise of the political powers ; for as to such only does the necessity of taxation exist, and not to enable the city government to become traders, merchants, bankers, ship-owners, manufacturers, or shareholders or partners in business associations, incorporated or unincorporated.

And a special franchise thus to deal with the property of the citizen, cannot rightly be exercised by the government, or municipal corporations formed under it.

To become dealers in stocks of private corporations, with a view to profit, or stockholders with a view to future revenue, is not one of the incidents of a city government, to accomplish which they may tax the property within the city limits.

In the nature of things, there can be no necessity for the exercise of such a power, and as the right of taxation rests upon the necessities of the case, the power cannot exist. That the work contemplated by the private corporation may, and probably will, prove beneficial to the interests of the city, does not vary the question. The purchase of the stock by the city may or may not be essential

to enable the corporation to perform its contract. It is enough that the city do not undertake the work, but merely become stock dealers, and they are not even bound to aid the company by subscribing to the stock—they may go into the market and buy it of the stockholders.

The work is in no way, and by no act recognized or treated as a public work, to be done by and at the expense, and for the benefit of the city, and as one of the legitimate duties resting on the city government. The decision of this question might, I think, very properly be rested in the absence of any express power conferred by the people in the constitution, and aside from any of the prohibitory and restraining clauses in that instrument, upon the absolute want of power in municipal corporations to burthen or tax the property of the citizen for the purpose named, and the want of jurisdiction in the State by legislation to confer the right. But the prohibitions of the constitution are, I think, ample to protect the citizen against taxes and burthens of this nature. Without referring more particularly now to the several provisions of the constitution in restraint of the power of the legislature over the property and credit of the whole State, and which would seem, in their spirit, to prohibit the granting of a power to a local government, in respect to the property and credit of a local community, which is expressly denied to the State government in respect to the entire public, I will simply refer to a provision which, I think, expressly forbids the legislature to grant the power which the act in question assumes to confer upon the Common Council of Rochester. The 9th section of article 8, was designed for the protection of the tax-payers, in cities and villages, against unwise and inexpedient taxation for purposes within the scope of the ordinary municipal legislature, and imposes a duty upon the legislature in respect to it. This duty, so far as a positive duty is enjoined, it is true, is one of imperfect obligation, and may not be enforced, and that it has been so esteemed by the legislature upon whom it was designed to act, is quite clear from an inspection of the Session Laws of the State from 1846 to the present time.

But of the propriety of restricting the power of cities in the exercise of their proper functions, in the respects named in this sec-

tion, the legislature must of necessity, be the exclusive judges, and it must be assumed by the other departments of the government, that what they have done, or omitted to do, in this direction, has been for good and sufficient reasons and in the exercise of a sound discretion.

But the section has a wider scope, and in the duty enjoined to restrict the power of the municipal legislatures to tax the property, or loan the credit of cities and villages, there is by a very plain and necessary implication, an absolute prohibition to enlarge their powers. A discretion is vested in the legislature as to the restriction, but none whatever in regard to the granting of new and enlarged powers in respect to taxation, and the creation of debts.

The power to tax property in aid of a private corporation, or for the purchase of its stock, is not among the ordinary powers of a municipal and local government, and require special legislation to confer it, and this special legislation is, I think, clearly prohibited by this section of the constitution.

Without this effect the provision is but an expression of opinion, a recommendation to the legislature, to which heed may or may not be given, and to give it significance and any effect as a part of the fundamental law of the land, it must be construed as an absolute restriction upon the powers of the legislature in conferring powers upon municipal corporations. This is its spirit and interest, and it must have this effect, or it has no practical force. There was an attempt to amend the provision, so as to save by implication, debts before contracted by cities and villages, but the amendment was negatived, and the section was adopted with only two dissenting votes, as it was introduced, and without amendment. Debates of Convention, Argus ed. 829. In the judgment of the convention, municipal corporations, in the exercise of their ordinary political functions, needed legislative restraint, and that their powers to tax the property, or charge the city with a debt, could not, with a due regard to the rights of its property holders and citizens, be enlarged; and in this section they have in substance and effect so said, and by it the legislative power of the State is restricted and limited: and as the act in question is in contravention of this provision of the constitution, it is void.

Again, within the principle settled by the Court of Appeals, in *Barto vs. Himrod*, 4 Seld. Rep. 488, the act of the legislature, under which the defendants assumed to act, is unconstitutional and void, for the reason that the fact of its becoming a law was made to depend upon the result of a popular vote. The authority to incorporate cities and villages, to prescribe their boundaries and define their powers and the mode and manner of their execution is devolved upon the legislature, and they cannot delegate this power, or devolve the duty upon any other body. I am unable to distinguish this case from that cited.

To what extent the sovereign power of the State was to be delegated to and vested in the Common Council of the city; in what cases, and to what extent they should possess the power, to charge the taxable property of the city, by immediate taxation, or by contracting debts to be paid in the future, and what in all respects should be the extent of the discretion and power of the Council as the local legislature for the territory embraced within the boundaries of the city, should have been definitely settled by the legislature as peculiarly within their province. The expediency of laws of this character is to be judged of by the legislature, and they cannot shrink from the constitutional responsibility resting upon them.

It is not the case of a law conferring new powers, or additional franchises upon a private corporation, which the corporation may elect to accept or not, as they deem expedient. This is the case of a law making provision for the government of a portion of the State, the exercise of a portion of the sovereign power of the State in a particular locality, and over the inhabitants residing within certain territorial limits, and all the people of that locality, as well as of the entire State, had committed it to the legislature to make and declare the law in that, as in every other matter under the constitution, and the minority have never agreed that a law passed by a majority vote at a popular election, should bind them or their estates, whether such law affects the whole State, or only a small portion of it. The vote of the city, as provided for by the act, was not to advise or control the Common Council in the exercise of their discretion in the matter of subscribing for the stock and issuing the

city bonds after the law had taken effect, but to decide whether the act vesting the discretion in the Council should become a law or not, which is the very case decided in *Barto vs. Himrod*. It would have been different, had the act of the legislature vested the power in the city government, but restricted the Common Council in its exercise, and made the exercise to depend upon the contingency of a favorable expression by the electors of the city ; but the question submitted was, whether the power should be conferred upon the city council to act in the premises, which rendered the law unconstitutional and void.

It followed, if I am right upon either of the three propositions considered, that the contract between the parties is absolutely void, and that the defendants cannot perform the same upon their part, and that if they in form fulfill their agreement and execute and deliver to the plaintiff the corporate bonds of the city, according to its terms, they would be worthless. The agreement of the plaintiff is therefore without consideration, and could not be enforced against him, and the money paid by him in part performance was paid without consideration, and may be recovered back in this action. The contract is still executory, and being incapable of performance without fault in the plaintiff, may be rescinded by him and an action maintained for the recovery of the money paid.

The defendants have received so much money, which, *ex æquo et bono*, belongs to the plaintiff. Chitty on Contracts, 622, 3—636, 7 ; *Young vs. Cole*, 3 Bing. N. C. 724 ; *Morgan vs. Groff*, 4 Barb. Rep. 524 ; *Rice vs. Peet*, 15 Johns. Rep. 503 ; *Gillett vs. Maynard*, 5 Johns. Rep. 85 ; *White vs. Franklin Bank*, 22 Pick. Rep. 181.

The plaintiff has, however, received certain sums of money from the defendants, and upon their order or draft upon the railroad corporation, which should be accounted for by him.

To this extent he has been benefited by the contract and by the acts of the defendants in the transaction, and has received money to which he is not entitled, and which, but for the contract, would have been received by the defendants. This is the proper subject

of a set-off in this action, and must be deducted from the amount paid by the plaintiff.

This amount he has received from the defendants, and is estopped from denying their title to it. Judgment must be given for the plaintiff for the balance, with interest, to wit, \$18,527 54.¹

In the Supreme Court of New York—Oswego General Term, 1856.

ISAAC H. BROWN *against* JACOB GOLDSMITH ET AL.

1. When a party calls for a part that was said at an interview of the parties, it does not follow that the other party may show all that was said. He may show so much of the conversation as made a part of the negotiations, or a part of the res gesta.
2. The court will not grant a new trial, even if the ruling of the judge was wrong; if upon the whole case justice has been done.

This action was upon a contract to pay the plaintiff a certain sum for making collections. The contract was by parol. The evidence showed the defendant settled the suit after the plaintiff had commenced, and without the consent of the plaintiff, on the ground that the plaintiff had sued a party that he agreed not to prosecute. The plaintiff in this suit showed by a witness that he was present when the defendants settled the suit. The defendants' counsel asked for all that was said at that interview, with the intention of showing what the defendants said about plaintiff's taking the claim. The justices trying the cause admitted the evidence, and the jury returned a verdict for the defendants.

The plaintiff appealed.

Charles Andrews, for plaintiff.

N. F. Graves, for defendants.

The opinion of the court was delivered by

BACON, J.—I am inclined to think that the testimony allowed to be given on cross-examination of the witness, Rosenbeck, was improperly admitted. It was on the presumption that a portion of the conversation had been given, and the defendants were entitled

¹ The reader is referred to the cases of *Sharpless v. Philadelphia*, 9 Harris, 147-188; 2 Am. Law Reg., 1, 27, 85; *Moers v. Reading*, 9 Harris, 188-203.—*Eds. Am. Law Reg.*